U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: April 28, 1998

CASE NO.: **97 INA 480**

In the Matter of:

TEE OFF RESTAURANT & LOUNGE,
Employer

on behalf of

ALFREDO MORENO-VERDUZCO,
Alien

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ALFREDO MORENO-VERDUZCO ("Alien") by TEE OFF RESTAURANT & LOUNGE ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On April 3, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Cook" in the Employer's restaurant. AF 35. The position was classified under DOT Occupational Code No. 313.361-014, as a COOK (hotel & rest.)[2] The Employer described the job duties as follows:

> Prepare & cook food according to recipes. Prepare special entrees such as Prime Rib, Steaks, Rack of Lamb, Roasted Pork Loin and a wide variety of pastas. Prepare a wide variety of sautee items and sauces.

AF 35 (Quoted verbatim without change or correction.) The hours were 3:00 PM to 11:30 PM on Tuesday, Thursday, and Friday, and 2:30 PM to 11:00 PM on Saturday and Sunday in a forty hour week at $8.03 per hour.[3] The Other Special Requirements were that the worker must provide his own knives; if hired, the worker must show a "legal right to work;" and references

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[2]313.361-014 **COOK (hotel & rest**.) alternate titles: cook, restaurant prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption in eating establishments: Reads menu to estimate food requirements and orders food from supplier or procures food from storage. Adjusts thermostat controls to regulate temperature of ovens, broilers, grills, roasters, and steam kettles. Measures and mixes ingredients according to recipe, using variety of kitchen utensils and equipment, such as blenders, mixers, grinders, slicers, and tenderizers, to prepare soups, salads, gravies, desserts, sauces, and casseroles. Bakes, roasts, broils, and steams meats, fish, vegetables, and other foods. Adds seasoning to foods during mixing or cooking, according to personal judgment and experience. Observes and tests foods being cooked by tasting, smelling, and piercing with fork to determine that it is cooked. Carves meats, portions food on serving plates, adds gravies and sauces, and garnishes servings to fill orders. May supervise other cooks and kitchen employees. May wash, peel, cut, and shred vegetables and fruits to prepare them for use. May butcher chickens, fish, and shellfish. May cut, trim, and bone meat prior to cooking. May bake bread, rolls, cakes, and pastry [BAKER (hotel & rest.) 313.381-010]. May price items on menu. May be designated according to meal cooked or shift worked as Cook, Dinner (hotel & rest.); Cook, Morning (hotel & rest.); or according to food item prepared as Cook, Roast (hotel & rest.); or according to method of cooking as Cook, Broiler (hotel & rest.). May substitute for and relieve or assist other cooks during emergencies or rush periods and be designated Cook, Relief (hotel & rest.). May prepare and cook meals for institutionalized patients requiring special diets and be designated Food-Service Worker (hotel & rest.). May be designated: Cook, Dessert (hotel & rest.); Cook, Fry (hotel & rest.); Cook, Night (hotel & rest.); Cook, Sauce (hotel & rest.); Cook, Soup (hotel & rest.); Cook, Special Diet (hotel & rest.); Cook, Vegetable (hotel & rest.). May oversee work of patients assigned to kitchen for work therapy purposes when working in psychiatric hospital. GOE: 05.05.17 STRENGTH: M GED: R3 M3 L3 SVP: 7 DLU: 81 Prepares food and serves restaurant patrons at counters or tables: Takes order from customer and cooks foods requiring short preparation time, according to customer requirements. Completes order from steamtable and serves customer at table or counter. Accepts payment and makes change, or writes charge slip. Carves meats, makes sandwiches, and brews coffee. May clean food preparation equipment and work area. May clean counter or tables. GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 3 DLU: 81

[3]Overtime of one or two hours was also anticipated, and would be paid at the rate of $12.04 per hour.

must be provided. No education requirement was given, but the Employer required two years' experience in the Job Offered or in the Related Occupation of Chef. *Id*. One U. S. worker applied for the position but was not hired. AF 26.[4]

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") of March 7, 1996. AF 31-33. , The CO concluded under 20 CFR § 656.21(b)(6), that the Employer failed to document that its rejection of Mr. Jones, the U. S. applicant, was lawful. The CO observed that when this applicant's resume was sent to the Employer on July 4, 1995, he was considered qualified by his two years of employment as a chef. The Employer contacted Mr. Jones by telephone on July 13, 1995, to inform him that it was checking his references and would "get back to him." When the Employer called Mr. Jones again to offer him the job eleven days later on July 24, 1995, he was no longer available.

The CO held that the Employer had not demonstrated good faith recruitment because nearly three weeks passed from the date that the resume was referred to the date when the Employer offered the position. Observing that the Employer could have interviewed Mr. Jones and offered him the job without delaying until July 24th as there was only a single applicant for the position, the CO said that the Employer did not appear to have attempted recruitment as soon as possible. The CO concluded that because negative results followed this untimely contact, the Employer's rejection of the worker on grounds that he is not available the U. S. applicant was not considered to be a rejection for lawful, job related reasons under the Act and regulations.[5]

Rebuttal. The Employer's April 9, 1996, rebuttal addressed the issue stated in the NOF. AF 19-30. The Employer contended that it could not have received the resume until July 6, 1995, and that its delay in contacting the U. S. worker was *de minimis*, and that a delay of seven days before its initial telephone contact with this job applicant was not bad faith recruitment under the circumstances of this case. Employer argued that this was sufficient to let Mr. Jones know that he was being considered for the position and that the job was clearly open to him, citing **Loma Linda Foods, Inc.,** 89 INA 289 (Nov. 26, 1991).
Employer argued that by telling the U. S. worker that he would be contacted again after his job references had been verified he had been given such reassurance of the availability of the job to him as the holding in **Loma Linda** contemplated. Employer said it began to verify the references on July 14, 1995, the day after it phoned Mr. Jones. The Employer continued its efforts until July 24, 1995, when it called him again, having by then given up on its efforts to

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[4]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[5]The CO also noted that this Employer had imposed an unusual and restrictive job requirement in that the cook must provide his own knives. As no rebuttal instructions were provided, it is assumed that this was not a material defect, that it required no rebuttal, and that it was waived by the CO for this reason.

reach one or more of the former employers that failed to return its telephone calls. The Employer concluded that in spite of the possibility that those two former employers might have given Mr. Jones an unfavorable recommendation it "waived its usual requirement of verifying all employment shown on the resume." Its argument continued, "Having received favorable recommendations from only two of the seven prior [e]mployers contacted, and contrary to Employer's general recruitment rule that all claims of prior employment must be verified, [the] Applicant was offered the position." AF 23.

Final Determination. The CO denied certification in the Final Determination issued on April 29, 1996. Noting the Employer's rebuttal, the CO rejected as unpersuasive the arguments that this occurred during a very busy business season, that the Employer's regular procedures justified a longer recruitment period, and that Employer had contacted Mr. Jones. AF 17. Noting the applicant "was lost" between July 13th and 24th, while Employer was attempting to check his references, the CO observed,

> The responsiveness or lack of responsiveness of the U. S. applicant's work references should not determine the ability of the employer to offer the U. S. applicant the job. Whereas the application had stated that references were required, the applicant had provided the references. The employer could have hired the applicant before receiving the responses from the references.

The CO finally observed that even though the Employer had two favorable references by July 17th, and there was no information challenging the experience listed on his resume at that time, still it waited another week to call the U. S. applicant again. The CO concluded that this was not sufficient to show a good faith attempt to recruit the only U. S. worker who applied, and that Mr. Jones was not rejected for reasons that were job related when he no longer was available on July 24, 1995.

Appeal. On May 16, 1996, the Employer appealed from the CO's denial of alien labor certification and requested review by BALCA. AF 01-15. The Employer argued that the standard hiring practice applicable to this case required "full analysis of the applicant's prior work history" and was "crucial in determining whether or not to offer the applicant the position." The Employer continued, "Not only does verification prove actual work experience, it also provides an employer with information on the performance of an applicant in the prior position." AF 02.

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, its use of additional hiring standards and recruiting practices is limited by the Act and regulations when the employer applies such criteria and procedures to U. S. job seekers in the course of testing the labor market in support of an application for certification to hire an alien for the job at issue. The Employer's appellate argument added new hiring conditions to its job requirements by asserting after the Final Determination that it would not hire a U. S. applicant

unless and until it was satisfied that the requested references showed that worker's past performance in the position to be acceptable under undisclosed subjective standards that it did not disclose when it applied and advertised the position.

We are not impressed with Employer's emphasis in its report that "only" two of the seven former employers gave Mr. Jones a favorable recommendation or with its claim that it that waived its "general rule that all claims of prior employment must be verified" in deciding to offer Mr. Jones the position. First, the two favorable employers were the only former employers who responded. The other five either could not be found or they did not return Employer's phone calls, if the undocumented representations in its rebuttal and brief are found to be credible. As there was no factual basis for the Employer's asserted apprehension that non-responding prior employers' responses, if received, would not have favored the U. S. worker, its argument based on this hypothesis is rejected as speculative and unmeritorious. See AF 23.

To the extent that the Employer relied on its undocumented standard policy in delaying further contact with the U. S. applicant, we find that any such policy regarding hiring practices does not take precedence over Department of Labor regulations regarding alien labor certification. As BALCA long ago pointed out, if an employer wishes to obtain labor certifications for an alien, it must modify its policies to conform with the regulations. **Security Life of Denver**, 88 INA 246, (Aug. 22, 1989). Moreover, the Employer's claim that such practices were standard industry procedure was not supported by any evidence of record to support a finding that this assertion was factual. **Gencorp**, 87 INA 659 (Jan.13, 1988)(*en banc*).

For these reasons we conclude that the Certifying Officer's denial of alien labor certification was supported by sufficient evidence of record and should be affirmed. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER

J. Lawson concurs. The failure to schedule a personal interview of the single applicant while checking reference over an eleven day period (AF 43) seriously undermines Employer's credibility and would cause applicant for a cook's position to wonder about availability of the job.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.